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IN THE
Supreme Court of the United States

October Term—1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,
—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-
GOLDWYN - MAYER DISTRIBUTING CORPORATION,
LOEW'S, INC. and CULVER EXPORT CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF.

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EDWARD C. RAFTERY,
EDWARD J. CLARKE,
Of Counsel.

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PETITIONERS' REPLY BRIEF.

Error.

The respondents (Resp. Brief, p. 31) properly point out an error in petitioners' brief. The contention there referred to (Pet. Brief, p. 14) was incorrectly stated to be in the Callaghan brief, was in fact made in the Belford brief.

However, Callaghan's counsel did devote his entire Point V (pp. 96 to 117) to pointing out the small portion which could be ascribed to Freeman's independent effort. This court held that the plea and the proof were ineffectual for any purpose.

Appendix.

Annexed hereto in an Appendix, are the sections of the Revised Statutes in effect prior to the Copyright Law of 1909.

No Precedent for Apportionment of Profits.

Respondents admit that there are no English or American copyright decisions which divide profits between the copyright owner and the infringer. The sole and only authority is an *obiter dictum* in a dissenting opinion by Judge McCormick in *Harold Lloyd Corp. v. Wiltner*, 65 Fed. (2nd) 1, 44 *et seq.* (C. C. A. 9).

If the division of profits in copyright cases were contemplated, the form of the English Statute is much more amenable to the idea than our statute. Our statute definitely gives to the copyright owner "all profits", conjunctively, with a right to injunction to stop the infringement, a right to impound during litigation, and a right to "destroy the infringing copies or devices, as well as all plates, molds, matrices or other means of making such infringing copies" (Sec. 25).

But there is no such conjunctive collection of remedies under the English Statute.

The English Statute of 1911 (1 and 2 Geo. 5, c. 46) provides that the copyright owner shall "be entitled to all such remedies by way of injunction or interdict, damages, accounts or otherwise, as are or may be conferred by law for the infringement of a right" (Sec. 6).

Yet even under the English Statute there is no known case where the profits were divided between the copyright owner and the infringer.

It is petitioners' contention that the copyright owner under our statute is entitled to *all profits* regardless of whether or not the infringement is deliberate.

But in the case at bar the court need not go so far, since the infringement has been held to be a "deliberate plagiarism" (R. 1264, 1265).

We will show later in this brief that it has been the general policy of equity to refuse to allow to deliberate trespassers even out-of-pocket expenses, and we submit that there is no precedent whatever for the other extreme, namely, allowing to deliberate trespassers not only all theoretical and actual expenses, but sharing with them the profits as well.

Basis of Respondents' Argument.

Respondents' argument is to the effect that the decision of the court below is:

1. In accordance with the Copyright Statute;
2. In accordance with the copyright decisions; and
3. In accordance with equitable principles applicable to the apportionment of profits (Summary of Argument, p. 9).

1. The decision of the Court below is not in accordance with the copyright statute.

(a) The Copyright Statute expressly gives to the copyright owner "all the profits which the infringer shall have made from such infringement".

(b) The Copyright Statute expressly provides "the plaintiff shall be required to prove sales only, and

the defendant shall be required to prove every element of cost which he claims" (Sec. 25 (b)).

(Contemplates an allowance to a defendant of "elements of cost". There is no suggestion that the infringer will be allowed to share profits.)

(c) The Copyright Statute provides that the copyright owner is entitled to enjoin the distribution of the infringement (Sec. 25 (a)).

(It is difficult indeed to justify dividing with the infringer profits made from the distribution of the infringement that the copyright owner has a right to prevent.)

(d) The copyright owner is entitled during the pendency of the action to impound "all articles alleged to infringe a copyright" (Sec. 25 (c)).

(Inconsistent with any right to profits on the part of the infringer.)

(e) The copyright owner is entitled to the destruction of "all infringing copies or devices, as well as all plates, molds, matrices or other means for making such infringing copies" (Sec. 25 (d)).

(Inconsistent with any right to profits on the part of the infringer.)

2. The decision of the Court below is not in accord with the copyright decisions.

See:

Callaghan v. Myers, 128 U. S. 617;

Belford v. Scribner, 144 U. S. 488;

Dam v. Kirk LaShelle, 175 Fed. 902.

and other cases cited in petitioners' main brief.

3. The decision of the Court below is not in accord with equitable principles.

The respondents have been held guilty of "deliberate plagiarism" (R. 1265) and "tracking (petitioners' play) step by step" (R. 1264).

Respondents fail to point out any "equitable principles" that go so far as to support the sharing of profits with infringers who are not deliberate, much less with those guilty of deliberate plagiarism.

Respondents (p. 16) say "The section (Sec. 25) plainly states that the copyright owner is entitled only to those profits 'made from the infringement'. This would appear clearly to contemplate an apportionment between those profits made from the infringements and those profits of the infringer attributable to causes other than the infringement."

This argument, we submit, is specious.

If the statute did not contain the qualifying words "made from the infringement" no one could say with certainty that the statute meant to limit recovery to profits made from the infringement or to include profits made from all other branches of the infringer's business. If the statute means what we think it does—that all the infringing profits shall be given to the copyright owner—then we submit it is difficult to fashion any language which would state that intent clearer than it has been stated in the present statute.

Compensation and Punishment:

Respondents' argument throughout in support of the sharing of profits, between the copyright owners and the infringers, takes its root in the so-called

MICRO CARD

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TRADE MARK 

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cause and effect premise. Respondents argue (pp. 18, 19):

"It is clear then, both in respect of patent and copyright infringement, that *damages* are awarded solely upon *compensatory* principles, measured by what the plaintiff has lost; and that profits are awarded solely on compensatory principles measured by the profits ascribable on the principle of cause and effect to the infringement."

The equitable principles that existed prior to the passing of the 1909 Copyright Statute, and which were formulated in that Statute are *not* based *solely* upon compensation.

The Statute was framed with two objects in mind:

1. To punish the infringer.
2. To compensate the copyright owner for his loss.

Respondents, branded as deliberate plagiarists, would gladly forget the *Turner*.

In *Providence Rubber Company v. Goodyear*, 76 U. S. 788 at page 804, this court said:

"The rule is founded in reason and justice. It *compensates* one party and *punishes* the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is, that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty, and invite to aggression."

(Italics ours throughout unless otherwise noted.)

In *Dean v. Mason*, 20 Howard 198 (61 U. S. 198), this court said:

"The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general is the damage done to the owner of the patent. It takes away the *motive* of the infringer of patented rights by requiring him to pay the profits of his labor to the owner of the patent."

In *Root v. Railroad*, 105 U. S. 189, at page 207, this court said:

"When relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid multiplicity of suits and to do complete justice, the court assumed jurisdiction to award compensation for the past injuries, not, however, by assessing damages, which was the peculiar office of a jury; but requiring an account of profits, *on the ground that if any had been made, it was equitable to require the wrong-doer to refund them as it would be inequitable that he should make a profit out of his own wrong.*"

The court then goes on as follows:

"As was said by Vice-Chancellor Wigram in *Coburn v. Simms*, 2 Hare 543, 'The Court does not by an account accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright, by the publication of a cheaper book', but, 'as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has

made by his piracy and gives them to the party who has been wronged.”

At page 214 the court said:

“The rule adopted was that which the court, in fact, applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage; that is to require them to refund the amount of profit which they have actually realized.”

In *Ferris v. Frohman*, 223 U. S. 424, 437, this court said:

“It was not the purpose or effect of the Copyright Law to render secure the fruits of piracy

* * *

The contention of respondents herein is inconsistent with the decision of this court in *Larson v. Wrigley*, 277 U. S. 97, where the non-allowance of an item of income taxes paid, would seem to depend upon the “conscious and deliberate wrong-doing.”

But there are many precedents and authorities for the proposition that courts of equity will deprive the trespasser or infringer of all profits from his wrong,—and where the trespass is shown to be deliberate, not even allowing him his cost or out-of-pocket expenses.

Deliberate Trespasser Not Entitled to Cost.

A series of cases directly in point are cases having to do with the removal of timber, ore and oil from lands. The principle established by these cases is as follows:

Where the taking was a deliberate taking, the owner is entitled to recover the full value of the property removed, at the point where demand is made, without any allowance whatever to the wrong-doer for expense or cost of the improvements thereto. It is not a question of sharing profits with the wrong-doer—Equity refuses to allow the wrong-doer to get back his expenses.

In *Bolles Woodenware Company v. U. S.*, 106 U. S. 432, the action was by the United States to recover the value of timber removed from public lands. The value of the timber at the point where cut was 25¢ a cord. The timber, at considerable expense, had been transported to the Town of Depere, and the value at the Town of Depere was \$3.50 a cord. The plaintiff made its demand at Depere, and sought to recover the value of the timber there. This court held that plaintiff was entitled to recover the value of the timber in Depere without any allowance for the expense or cost of transportation by the wrong-doer, even though the timber was then in the possession of an innocent purchaser who had paid the full value of \$3.50 per cord.

This court said that to hold otherwise was "to give encouragement and reward to the wrong-doer."

That case has been followed in a number of other decisions.

Guffey v. Smith, 237 U. S. 101, was a suit in equity by the holders of an oil and gas lease to enjoin operations under a later and similar lease, and to obtain a discovery and an accounting in respect of the oil and gas produced and sold in the course of operations already had. Again this court refused to allow any deduction because of expense connected with oil and gas

taken after actual notice, saying "what was done thereafter cannot be regarded as anything less than a wilful taking and appropriation of the oil which was subject to complainant's superior right" (p. 119).

In *Williamson v. Chicago Mill & Lumber Corp.*, 59 Fed. (2nd) 918 (C. C. A. 8), an action was brought in equity to quiet title and for an injunction against trespass. A supplemental complaint for damages resulting from the trespass pending the litigation was filed. The evidence showed that the value of the timber at the time and place where it was cut was \$6,240 and the value where it was stacked on the border of the appellant's land was \$10,400. The question was the measure of recovery by the property owner; that is, the value of the timber as stumpage or its value as stacked upon the edge of appellant's land. The court, following the *Bolles Woodware Company* case, found that the evidence established a wilful trespass, and decreed that the enhanced value of the timber without deduction for improvements should go to the complainant because of the wilfulness of the trespass.

See also

*Pittsburgh & West Virginia Gas Company,
et al. v. Pentress Gas Company, et al.*, 7
ALR 901, 100 S. E. 296,

and the full annotation therein contained.

"Restatement of the Law" on "Restitution", Section 158 at page 632 (Comment d) states:

"The conscious wrongdoer is ordinarily not allowed compensation for an improvement or addition to the subject matter. This is consistent with the rule of damages in actions for conver-

sion in which case the conscious wrongdoer is required to pay for the full value of the chattel as improved by him before demand for its return."

Turning then to Section 151 (Comment d), we find:

"Where a person with knowledge of the facts has wrongfully obtained another's chattels and thereafter makes additions to them, he is under a duty of returning them in specie even though the duty is not specifically enforceable, unless the additions or improvements are so great as to transfer the title to him. It follows, therefore, that although the owner is not able to get the things back, either because self-help is not practicable or because the remedy afforded, such as replevin, is not adequate, he is entitled to the full value of such things after the additions have been made but before the title is obtained. This is a form of penalty imposed upon a person who has done a consciously wrongful act."

Expenses or Profits.

The case of *Larson v. Wrigley, supra*, in which this court refused to the deliberate wrong-doer credit for income taxes paid, is consistent with the aforesaid line of cases in which this Court has refused to allow a deliberate trespasser to get back his out of pocket expenses.

And Judge Hand, in the court below, recognized and made effective that principle when he reversed the ruling of the Special Master as to an item of income taxes. He said (R. 1270, 1271):

"The plaintiffs' first objection is to the master's allowance as a credit of the income taxes

paid by the defendants. He allowed them because he thought that the defendants were not deliberate plagiarists; otherwise the case would have fallen within the ruling of the Supreme Court in *L. P. Larson, Jr. Co. v. Wm. Wrigley, Jr., Co.*, 277 U. S. 97 (other cases cited). From what we have already said regarding the defendants' guilt, it appears that the master was wrong."

The learned Court thus refused to allow respondents out of pocket expenses,—income taxes,—because of "defendants' guilt";—and at the same time gave to the same "deliberate plagiarists" 80% of the net profits.

The "In Lieu Of" Provision.

At page 61 of their brief, respondents argue that the award of the court below is sustainable under the so-called "in lieu of" provision of Section 25 (b) of the Copyright Act.

The "in lieu of" provision of Section 25 (b) is not involved in this proceeding.

Pursuant to decree of the District Court the Special Master stated the "profits" and awarded them to petitioners.

The District Court confirmed the award of the Special Master. The provisions of the "in lieu of" clause were not involved and resort thereto was not made necessary as "actual profits" were shown to exist.

The Circuit Court of Appeals modified the award only to the extent of dividing the "profits" between the copyright owners and the infringers, but did not substitute any allowance under the "in lieu of" provisions.

The petitioners herein have specified as error the dividing of the "profits" (See Specification of Errors, Petition for Certiorari, pp. 13-14).

There is no specification of error that involves the "in lieu of" provision either directly or indirectly.

Purpose of the "In Lieu Of" Provisions of the Copyright Statute.

Section 25 of the Copyright Law provides that the infringer shall be liable:

(b) To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * * or *in lieu of* actual damages and profits, such damages as, to the court shall appear to be just, etc.

The aforesaid language would seem in its ordinary meaning to be clear, to the effect that in the *absence* of profits the court has discretion, within the limits of which it may fix such *damages* as might be just.

In *Douglas v. Cunningham*, 294 U. S. 207, 209, this court stated:

"The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law rendered difficult or impossible proof of damages or discovery of profits."

The Circuit Court of Appeals for the Second Circuit so interpreted the statute in *Davilla v. Brunswick-Balke-Collender Company*, 94 Fed. (2nd) 567.

(cert. denied 304 U. S. 572). The court there points out that the awarding of statutory damages under the "in lieu of" provisions is not a matter of choice with the plaintiff, and that the "in lieu of" provisions are not applicable where *actual profits* exist and are capable of proof.

The same construction was placed upon the provisions of the statute by the Second Circuit Court of Appeals in *Hendricks v. Thomas*, 242 Fed. 37. At page 41 the court said:

"As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits."

In *Dam v. Kirk LaShelle*, 175 Fed. 902, at 911, the Circuit Court of Appeals for the Second Circuit, on a petition for modification of order for ~~mandate~~, said *per curiam*:

"The ~~degree~~ awards profits, and the complainant expressly disclaims any desire to recover damages. We know of no principle upon which a court of equity can compel a complainant to take damages instead of profits when *he* insists upon the latter."

In the case at bar, "profits" were found and stated. Neither side excepts thereto. The only exception is to the amount thereof and the method and means of fixing "profits", and to the fact that the court below

ruled that there could be a division of profits between the copyright owners and the perpetrators of a "deliberate plagiarism".

Allowance of \$922,141.09.

Respondents' brief, page 76, *et seq.*, argues for the allowance of this item. They argue that the two cases of *Stromberg Motor Devices Co. v. Detroit Trust Company*, 44 Fed. (2nd) 968, C. C. A. 7, and *Stromberg Motor Devices Co. v. Zenith-Detroit Corp.*, 73 Fed. (2nd) 62, C. C. A. 2, support their position. The first *Stromberg* case involved the commissions of one Heftler. He received (p. 963) "a small fixed salary and a certain percentage of the business done. This percentage amounted for the infringing period to \$98,700.49." It also appears (p. 963) that this commission was compensation for more than eight years of this accounting period. The whole amount paid represents a compensation to Heftler which is not at all out of reason as such matters go."

In the second *Stromberg* case regarding this compensation, the court said (p. 65):

"The defendant's contract with its president was made before any question of the infringement of the Mock patent arose and was not an unusual one."

Can it be said that the situation is comparable to that of the three individuals in the case at bar, who received this huge commission plus their extremely large salaries? Theirs could not be termed "a small fixed salary"—so also the \$98,000 commission involved in the first *Stromberg* case over a period of "eight years" is not comparable to the \$922,000 received by three individuals in *one* year. Surely the contract was an "unusual one".

It is perfectly clear that these individuals have an unquestioned legal right to this compensation *inter se* against Loew's, Inc. No one, or at least, not these petitioners, can question it. But as pointed out in *Lee v. Malleable Iron Range Co.* 247 Fed. 795, 798:

"The large amount, the terms of corporate resolutions for their contingent award, their progressive increase with increased profits, and their treatment as such dividends or division upon the books, are *alone* sufficient to support the master's view. (Master had found it to be a division of profits.) The resolutions, if lawful, while authority for their ultimate payment, nevertheless placed no obligation upon the beneficiaries not already comprehended within their contracts for service at stipulated salaries."

The amount of the commission salaries in the *Lee* case was \$207,486.94, divided between three managers (p. 798) over an accounting period of *six* years (p. 796).

The salaries of the three gentlemen in the case at bar for the year 1932 were (R. 987):

Thalberg—	\$200,000
Mayer—	130,000
Rubin—	104,000

If we divide the item of \$922,141.09 into thirds, it will provide compensation in addition to salaries of approximately \$307,000 to each of the individuals whose total compensation for the year in question will then be in excess of

Thalberg—	\$507,000
Mayer—	437,000
Rubin—	411,000

These sums combined with the terms of the documents involved (Ex. 33) and the history of the transaction spell out the *sharing of profits*—not *compensation for services*.

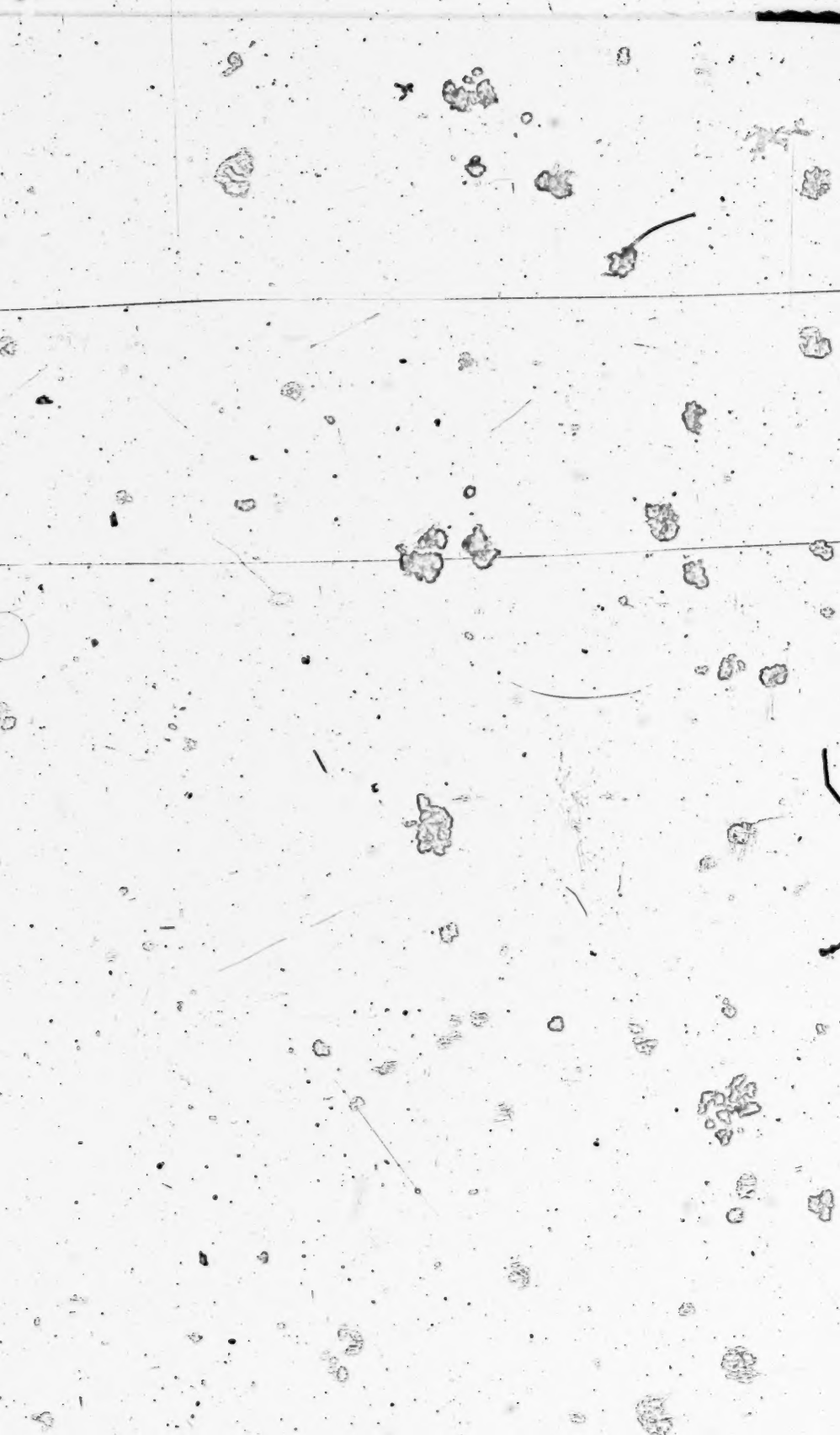
Let us refer once more to the well established principle of equity discussed hereinabove to the effect that equity will not allow a deliberate trespasser to profit by his wrong; and to enforce that principle, equity will not allow to such a trespasser even the recovery of his actual out-of-pocket expenses. Contrary thereto the Court below in the case at bar has made the following allowances:

1. Out-of-pocket expenses.
2. Theoretical expenses which were not out-of-pocket, such as depreciation and interest on investment.
3. A share in the profits to Mayer, Thalberg and Rubin, represented by the proportionate part that the picture LETTY LYNTON contributed to the item of \$922,141.09, *prior* to any share for the petitioners.
4. A division of what remained of the profits *after*,—divided between petitioners and respondents on the basis of 20% and 80%.

Respectfully submitted,

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APPENDIX.

**Applicable Sections of the Revised Statutes in Effect
Prior to the Present Copyright Law of 1909.**

Sec. 4964. Every person who, after the recording of the title of any book and the depositing of two copies of such book, as provided by this Act, shall, contrary to the provisions of this Act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, dramatize, translate, or import, or knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this Act, shall, within the term limited, contrary to the provisions of this Act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other

article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuery, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale: Provided however, that in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and: Provided, further, That in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States.

Sec. 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than 100 dollars for the first and 50 dollars for every subsequent performance, as to the court shall appear to be just. * * *

Sec. 4970. The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, in such terms as the courts may deem reasonable.